OPINION

of the Supreme Court of Tennessee

(Entered November 3, 1965)

Plaintiff in error, John Webb, and the defendant in error, The State, will hereinafter be referred to as they appeared in the Lower Court; that is, the defendant and The State, respectively.

The defendant was indicted on October 23, 1963, for the crime of receiving and concealing stolen property. On February 19, 1965, the defendant was convicted of receiving and concealing stolen property of a value in excess of $100.00, and his punishment was fixed at no more than three years in the Penitentiary. Judgment was entered upon the verdict and a Motion for New Trial was overruled on March 23, 1965. On June 2, 1965, another hearing was held on a Motion for a New Trial on the basis of newly discovered evidence, whereupon said motion was overruled by the Trial Court. Appeal has been perfected to this Court.

The evidence contained in the record before this Court shows that on September 23, 1963, a 1963 Chevrolet automobile was stolen from Russell Ranson, Jr. On September 25, 1963, Ranson was notified by the police that his car had been located, parts had been removed therefrom, and he was told that it would have to be towed to the closest garage, which was Morningside Garage. Mr. Ranson went to the garage, where he saw another 1963 Chevrolet parked on a painting rack, the front-end of which had apparently been repainted. It appears that

the Ranson vehicle had had most of the parts removed, except the wheels and heater. While at the Morningside Garage, Mr. Ranson noticed that parts being used on the car being painted were some of the parts stripped from his car.

Mr. Ranson notified the Chattanooga Police Department, and a Mr. Howard Shutters, an investigator for the District Attorney General's Office, came to the garage. Mr. Ranson then positively identified the parts being used to repair the car being painted as parts stolen from his automobile. The defendant, John Webb, the owner and operator of the Morningside Garage, stated that he had bought the parts from Mr. Danny Devitt, for either $150.00 or $250.00, the parts being valued at about $400.00 by Mr. Ranson. The defendant offered to remove the parts at the time Mr. Ranson identified them. Mr. Shutters testified that he told the defendant to leave the maroon, or red, Chevrolet, the car that was being painted and repaired by the defendant, at the garage, until he was further advised by the officers. Later in the day Mr. Shutters returned to the garage and found the car to which the stolen parts had been affixed, missing. There is a substantial variance in the testimony as to whether or not the defendant was cooperative in assisting Mr. Shutters to obtain the identity of the person who owned the car. Mr. Shutters testified that the defendant refused to give him the name of the owner of the car, but would only tell him that he thought the owner lived in Copper Hill. As a result of this behavior, the defendant was arrested. Other witnesses at the trial testified that the defendant did give Mr. Shutters the name of the owner of the automobile with the stolen parts attached to it. Later that night, the automobile with the stolen parts was located; and its owner, a Mr. Herbert Hood,

testified that the defendant did not advise him that it was suspected that the parts with which he repaired Mr. Hood's automobile were stolen.

The defendant appeals, assigning as error the following:

> "The Court erred in overruling the new trial motion, as
>
> (1) Verdict contrary to the law and the evidence.
>
> (2) The undisputed evidence shows that no action of the defendant could be construed as conforming to the elements required by law, to be guilty of receiving and concealing stolen property.
>
> (3) The Court erred in excluding from evidence the opinion in the case of State of Tennessee v. James Daniel Devitt, as this opinion, in and of itself, would have proven the defendant innocent beyond any doubt."

The elements necessary for a conviction for receiving and concealing stolen goods are clearly set out in T.C.A., Sec. 39-4217, and by this Court, in *State* v. *Missio*, (1900) 105 Tenn. 218, 58 S.W. 216, as follows:

> "It is not necessary to prove who stole the goods, nor the name of the party from whom taken; but it is necessary to prove the ownership, general or special, of some person, and the fact that they have been stolen from the true owner by some one, and have eventually been received by the defendant, knowing them to have been stolen, and with the intent on the part of the defendant to deprive the true owner thereof, and when the ownership is laid in a certain person it must be so proven."

See also, *Williams* v. *The State,* (1965) ..... Tenn. ....., 390 S.W.2d 234, quoting with approval the above from the *Missio* case.

It is also the law of this State that where a jury has returned a verdict against the defendant in a criminal case, and the Trial Judge has entered judgment thereon, there arises a presumption of guilt against the defendant. *Cooper* v. *The State,* (1909) 123 Tenn. 37, 138 S.W. 826. The burden is then on the defendant to show that the evidence preponderates against the verdict. *Holt* v. *The State,* (1962) 210 Tenn. 188, 357 S.W.2d 57. This verdict is also entitled to great weight in determining the credibility of the witnesses and in resolving any conflicts in their testimony, for it clearly indicates where there is conflict in the testimony, who the jury chose to believe and who they chose not to believe. Under the facts in this case, this Court cannot say that from a consideration of all the evidence contained in the record that the evidence so preponderates against the jury's verdict and the judgment of the Trial Court, that the same must be overturned. Rather, we find there is sufficient evidence in the record to support the jury's verdict that the defendant was guilty of receiving and concealing stolen property, that the jury chose to believe, as it seems they did, the testimony of Mr. Shutters, that the defendant knowingly refused to reveal the name of the owner of the car to which the stolen parts were attached. This would certainly be a basis for a finding that the defendant knowingly concealed stolen property. The judgment of the Trial Court is affirmed and costs are assessed against the defendant.

OPINION ON PETITION TO REHEAR

of the Supreme Court of Tennessee

(Entered March 9, 1966)

Since the filing of the original opinion in this cause, a petition to rehear and a supplemental petition to rehear have been filed. The petition to rehear cites no new authority, makes no new argument, nor does it present any overlooked material fact. Rather, the petition to rehear of plaintiff in error (1) insists, as was done in his brief on appeal, that this cause is somehow controlled by the opinion in *State* v. *Devitt*, (1964) ..... Tenn. ....., 384 S.W.2d 26, (2) insists, as was likewise done on the prior appeal, that the trial court erred in refusing to grant plaintiff in error's motion for a new trial, due to newly discovered evidence, and (3) insists that this court overlooked the evidence establishing the good character and reputation of the defendant. Plaintiff in error's first contention seems to somehow relate the opinion in *State* v. *Devitt*, supra, to the absence of any evidence of concealment in the instant case. Suffice it to say here that, as pointed out in the original opinion, Webb's refusal to reveal to the authorities the identity and whereabouts of the person on whose car the stolen parts had been used, and, coupled with his failure to reveal to the owner of this car the probability that the parts were stolen, satisfactorily establishes concealment.

In regard to plaintiff in error's second contention, a brief review of the procedure in the trial court is necessary. The plaintiff in error was convicted on February 19, 1965, for receiving and concealing stolen property. His first motion for a new trial was overruled on March 23, 1965, and on June 2, 1965, another hearing was held on a motion

for a new trial on the basis of newly discovered evidence, which motion was also overruled by the trial court. It is the overruling of this motion for a new trial on the basis of newly discovered evidence which the plaintiff in error here insists constituted error requiring correction by this Court.

The so-called newly discovered evidence presented at this trial consisted of the testimony of certain persons alleged to have heard the conversation between the investigating officer, Mr. Shutters, and the plaintiff in error. Their testimony was to the effect that the plaintiff in error did tell Mr. Shutters the name of the person who owned the car upon which the stolen parts had been placed. The trial court properly overruled this motion for a new trial. The record leaves no doubt that these witnesses were known from and after the outset, to the plaintiff in error. They were present, along with plaintiff in error at the conversation with Officer Shutters.

To support this contention, it was incumbent upon the plaintiff in error to establish that due diligence had been used in obtaining the evidence upon which his motion for a new trial was based at the prior trial. No such showing was made by the plaintiff in error. This evidence obviously could have been obtained in time for the hearing of the cause. It is the rule of this Court, even if due diligence is established, if the newly discovered evidence consists entirely of additional witnesses to the same facts and circumstances, such circumstances are cumulative and a new trial shall not be granted. See *Tabler* v. *Conner*, (1873) 60 Tenn. 195; *Monday* v. *Millsaps*, (1953) 37 Tenn. App. 371, 264 S.W.2d 6. The factual issue of whether or not the plaintiff in error revealed to Mr. Shutters the name of the owner of the car upon which the stolen parts were

used was hotly contested at the trial. This being so, it is abundantly evident that the testimony of these witnesses would be merely cumulative, and no satisfactory reason has been given for the failure of the plaintiff in error to present this testimony on the first trial.

Plaintiff in error's third contention concerns an alleged failure of this Court to give the proper weight to the testimony of character witnesses called by the plaintiff in error. This is obviously evidence to be weighed by the jury. There is no showing that the jury failed to properly consider this testimony. It is the well settled law of this State that where a jury has returned a verdict of guilty in a criminal case and the trial court has entered judgment thereon, there arises a presumption of guilt against the defendant. *Cooper* v. *State,* (1909) 123 Tenn. 37, 138 S.W. 826. The burden is then on the defendant to show in this Court that the evidence preponderates against the verdict. *Holt* v. *State,* (1962) 210 Tenn. 188, 357 S.W.2d 57. With this rule in mind, this Court certainly cannot say that the character evidence referred to by plaintiff in error in any way overcomes this presumption of guilt.

The supplemental petition to rehear filed by additional counsel or substitute counsel raises issues presented for the first time. It is not even contended that these issues are properly raised. It is the rule of this court and the law of this state that there can be no Assignment of Error in a Criminal case before this Court unless the record affirmatively shows that the alleged error was seasonably called to the attention of the trial judge and ruled on adversely to the plaintiff in error. See Rule 14 (4) and (5), Supreme Court Rules, and cases cited thereunder.

It is also apparent from the supplemental petition that leave to file this supplemental petition was never properly

obtained, as is required by Rule 32, Rules of the Supreme Court of Tennessee.

It is essential to the orderly process of law that the rules of this Court be complied with. It is a rare case where noncompliance with the rules of this Court will be permitted. This is for the reason that they are so extremely essential to the orderly and timely transaction of the business of the Court. In our opinion, this is not such a case.

For the foregoing reasons, it is the opinion of this Court that plaintiff in error's petition to rehear and supplemental petition to rehear must be, and hereby are, denied.

TENNESSEE CODE ANNOTATED

Section 39-4217

Every person who shall fraudulently receive or buy, conceal, or aid in concealing, any goods over the value of one hundred dollars ($100.), feloniously taken or stolen from another, or goods obtained by robbery or burglary, knowing the same to have been so obtained, with intent to deprive the true owner thereof, shall be imprisoned in the penitentiary not less than three (3) years nor more than ten (10) years.

CONSTITUTION OF THE UNITED STATES

Amendment 4:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

Docket No. [redacted] 224

JOHN WEBB,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for the Writ of Certiorari.

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BRIEF

In Opposition to the Petition for the Writ of Certiorari.

MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, for its statement in opposition to the petition for writ of certiorari, respectfully shows to the Court as follows:

OPINIONS BELOW.

The original opinions of the Supreme Court of Tennessee upon petitioner's direct appeal from his conviction are set out in full in the Appendix to the Petition, pages A1 through A8.